ECORD AND BRIEFS

No. 16-1276

Supreme Court, U.S.
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In The
Supreme Court of the United States

DIGITAL REALTY TRUST, INC.,

Petitioner,

v.

PAUL SOMERS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF TAXPAYERS AGAINST FRAUD EDUCATION FUND AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Taxpayers Against Fraud Education Fund ("TAFEF") respectfully submits this brief as *amicus curiae*.

TAFEF is a nonprofit, tax-exempt organization dedicated to advancing and protecting whistleblower approaches to fraud enforcement by federal and state authorities. TAFEF consulted with legislative and agency stakeholders in drafting the whistleblower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") and the accompanying rules and regulations. TAFEF's members regularly make whistleblower submissions to the Securities and Exchange Commission (the "Commission") on behalf of individuals to protect investors and markets through a public-private partnership.

SUMMARY OF ARGUMENT

This case calls for the application of a well-settled principle: when interpreting a statute, courts and agencies should look to the whole statute to best effectuate Congress's intent. When the statutory definition of a term is in tension with the statute's substantive provisions, courts and agencies adopt

[1] No party's counsel authored this brief in whole or in part, and no persons or entities other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

context-appropriate definitions to resolve this tension. Dodd-Frank's whistleblower provision, 15 U.S.C. § 78u-6, defines "whistleblower" as an individual who reports to the Commission. By not referencing individuals who raise concerns internally, however, this definition undermines the statute's operation and the clear legislative intent behind it. The Commission, by adopting context-appropriate definitions of "whistleblower" to protect internal whistleblowers against retaliation, 17 C.F.R. § 240.21F-2, addressed this problem as it should: by giving full effect to the statute Congress enacted.

I. Rule 21F-2 recognizes that Congress passed Dodd-Frank to solve particular problems. Congress heard a series of similar stories while investigating the 2008 financial crisis and the Madoff Ponzi scheme: whistleblowers tried to alert their employers and the government to massive securities frauds, but were both ignored and retaliated against. Whistleblowers lost their jobs and were blacklisted by the financial services industry. The frauds that whistleblowers sought to expose eventually collapsed, costing investors trillions and bringing global capital markets nearly to a halt.

II. In response to these crises, Congress passed Dodd-Frank to prevent similar problems in the future. A key component of Dodd-Frank is its whistleblower program, for which Congress drew upon testimony and other evidence before it, including its experience with other whistleblower laws. Congress was aware that financial rewards alone would not encourage whistleblowers to step forward: whistleblowers—particularly

those in the financial services sector—also needed more robust protections against retaliation than those offered by Sarbanes-Oxley. Dodd-Frank's whistleblower provision includes both incentives to report and protections from retaliation to encourage whistleblowers to speak up about securities fraud. The whistleblower protections include confidentiality provisions aimed at preventing industry blacklisting.

III. When the Commission adopted rules implementing Dodd-Frank's whistleblower provisions, the regulated community and the Commission agreed that Congress intended to protect whistleblowers who reported potential securities laws violations, regardless of whether the reports were made internally or to the Commission or both. The Commission's Rule, 17 C.F.R. § 240.21F-2, implements this shared understanding of the whistleblower provisions.

IV. Rule 21F-2 likewise comports with the statute's text, structure, and underlying policy. Mechanical application of the statutory definition, as Petitioner urges, ignores the structure of Section 78u-6 by rendering its anti-retaliation and confidentiality provisions incompatible. Petitioner also ignores much of the statute's text, and its reading produces results that advance no apparent legislative purpose. Confronted with similar circumstances, this Court has adopted context-appropriate definitions over statutory definitions and has ordered that agencies do the same. Rule 21F-2 follows this command.

The decision below should be affirmed.

ARGUMENT

I. At the time it enacted Dodd-Frank, Congress understood that the failure to encourage and respond to whistleblowers had undermined protection of investors and the markets.

A. Whistleblowers sought to expose the fraud and noncompliance that led to the Madoff scandal and the financial crisis but were ignored and suffered retaliation.

The 2008 financial crisis and the Madoff scheme collectively destroyed trillions of dollars in wealth. In response, Congress held hearings and created the Financial Crisis Inquiry Commission ("FCIC") to investigate the causes of the crisis. As Congress considered how to prevent these problems from reoccurring, it heard testimony from whistleblowers who had tried to stop the misconduct and to alert the government to the wrongdoing, but who went unheeded and were left unprotected.

The FCIC heard testimony from Richard M. Bowen, III, who shared his experiences as a Citigroup whistleblower. *See Subprime Lending & Securitization & Gov't-Sponsored Entities: Hearing Before the Fin. Crisis Inquiry Comm'n* (2010) (statement of Richard M. Bowen, III). Mr. Bowen had emailed senior management in November 2007 to warn of "significant but possibly unrecognized financial losses existing

within Citigroup." *Id.* at 2. He identified, among other things, tens of billions in risky loans that the company had warranted to investors and that Citigroup may have been required to repurchase if the borrowers defaulted. *Id.* First he was ignored, then he was stripped of most of his responsibilities, and finally he was fired. William D. Cohan, *Was this Whistle-Blower Muzzled?*, N.Y. Times, Sept. 21, 2013, at SR4. Within a year of Mr. Bowen's email, Citigroup's stock fell by more than ninety-five percent.

Congress heard directly from several whistleblowers, including Matthew Lee, who had been with Lehman Brothers for 14 years. *Public Policy Issues Raised by the Report of the Lehman Examiner: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. 75-77 (2010) (statement of Matthew Lee). Lee alerted senior management to accounting and valuation irregularities that made the firm appear to be on stronger financial footing than it was. *Id.* He was fired within a week. *Id.* Two other Lehman whistleblowers suffered the same fate. *Id.* at 68 (statement of Rep. Kilroy). Months later, Lehman filed for Chapter 11 bankruptcy protection after 158 years of operation.

The most prominent pre-crisis whistleblower, Harry Markopolos, told Congress that he had alerted the Securities and Exchange Commission to the Madoff Ponzi scheme in 2000. *Assessing the Madoff Ponzi Scheme & Regulatory Failures: Hearing Before the H. Subcomm. on Capital Mkts., Ins., and Gov't Sponsored Enters. of the Comm. on Fin. Servs.*, 111th Cong. 5

(2009) (statement of Harry Markopolos) ("Markopolos Testimony"). After determining that Madoff's claimed returns were impossible, Mr. Markopolos reported to the Commission in 2000, 2001, 2005, 2007, and 2008, but nothing happened. *Id.* In 2008, after investors had entrusted over $50 billion to Madoff's management, the scheme collapsed. *Id.* For speaking up, Mr. Markopolos was blacklisted from the financial industry. *Id.* at 38-39.

B. The Sarbanes-Oxley Act failed to prevent the financial crisis or adequately protect whistleblowers.

As Congress set out to address these issues, it was not working on a blank slate. Congress had enacted the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 ("Sarbanes-Oxley"), to prevent the kinds of serious public harm that followed massive frauds at public companies, most notably Enron and WorldCom. With Sarbanes-Oxley, Congress sought to compel companies to establish processes—such as audit procedures and internal reporting—to discover and stop wrongdoing. Among other provisions, Sarbanes-Oxley mandated increased internal controls relating to financial reporting, *see id.* §§ 302, 404, 906, to protect shareholders by encouraging publicly-held companies to engage in greater self-regulation. *See* Fin. Crisis Inquiry Comm'n, *The Financial Crisis Inquiry Report* 60 (2011). For similar reasons, Sarbanes-Oxley also included modest protections for whistleblowers at publicly-traded companies. *See* Sarbanes-Oxley § 806.

Of relevance here, these protections included protections from retaliation for raising concerns about suspected wrongdoing internally. *See id.* § 806(a)(1)(C) (codified at 18 U.S.C. § 1514A(a)(1)(C)).

But the Sarbanes-Oxley approach of reliance on self-regulation proved ineffective and did not prevent the financial crisis of 2008. Nor did the Act adequately protect whistleblowers. A study reviewing the first three years of Sarbanes-Oxley whistleblower cases found them "remarkably one-sided," with less than seven percent of whistleblowers winning their cases. Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 Wm. & Mary L. Rev. 65, 91 (2007).

C. Whistleblowers generally raise concerns internally and often suffer retaliation as a result.

While Congress was investigating the causes of the 2008 financial crisis, it was learning more about experiences of whistleblowers generally.

The 111th Congress, which enacted Dodd-Frank, also passed the Fraud Enforcement and Recovery Act of 2009 ("FERA"), Pub. L. No. 111-21, 123 Stat. 1617, to amend the False Claims Act. In the FERA debates, Congress considered the experiences of False Claims Act whistleblowers, who often raised concerns internally notwithstanding the potential financial rewards for reporting to the government. As Senator Grassley stated, "[m]ost of the whistleblowers whom I know

about did not even know about whistleblower protection laws, did not even know about false claims laws until they go into it." 155 Cong. Rec. S4412 (daily ed. Apr. 20, 2009). And indeed, studies had found "no evidence" that the financial incentives of the False Claims Act discourage internal whistleblowing. Thomas L. Carson et al., *Whistle-Blowing for Profit: An Ethical Analysis of the False Claims Act*, 77 J. Bus. Ethics 361, 367 (2008).

Reports to and testimony before Congress emphasized that whistleblowers raised concerns internally at their peril. For example, a 2004 Cong. Research Serv. report described the difficulties of pointing out suspected wrongdoing in a corporate setting and identified the types of retaliation that whistleblowers suffered. *See* Mark Jickling, Cong. Research Serv., RL32718, *Barriers to Corporate Fraud: How They Work, Why They Fail* 31 (2004). In hearings before the 110th Congress, a False Claims Act whistleblower described her termination for raising concerns internally and urged Congress to adopt "comprehensive retaliation protections." *The False Claims Act Correction Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century, Hearing on S. 2041, The False Claims Act Correction Act Before the S. Comm. on the Judiciary*, 110th Cong. 19-21 (2008) (statement of Tina M. Gonter). The 111th Congress also heard that entire industries can retaliate against whistleblowers. *See* Markopolos Testimony at 15, 38-39, 42 (whistleblowers blacklisted from the financial services industry for speaking up).

Social science supported this testimony. A study pre-dating Dodd-Frank noted that in "circumstances where an organization is dependent upon the continuation of the wrongdoing or when they are not dependent upon the whistleblower . . . the organization is more likely to retaliate against the whistleblower and continue the wrongdoing." Jessica R. Mesmer-Magnus, et al., *Whistleblowing in Organizations: An Examination of Correlates of Whistleblowing Intentions, Actions, & Retaliation*, 62 J. Bus. Ethics 277, 281 (2005). That same study also found that whistleblowers who report significant and/or frequent wrongdoing face greater risks of retaliation. *Id.* at 292. Retaliation against internal whistleblowers is swift, and often occurs immediately after they report internally. *See* Terry Morehead Dworkin et al., *Internal vs. External Whistleblowers: A Comparison of Whistleblowing Processes*, 17 J. Bus. Ethics 1281, 1296 (1998).

Congress had known about these threats to whistleblowers for decades, and had historically legislated to protect against them. In hearings before the 110th Congress, Representative Linda Sanchez noted that Congress added anti-retaliation provisions to the False Claims Act in 1986 after "witnesses testified that they didn't blow the whistle on fraud because there was no anti-retaliation protection." *The False Claims Act Correction Act of 2007: Joint Hearing on H.R. 4854 Before the Subcomm. on Courts, the Internet, and Intellectual Prop. and the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 124 (2008).

II. Congress enacted the Dodd-Frank whistleblower provisions to curb fraud and protect investors by encouraging both internal reporting and reporting to the government through interrelated incentives and protections.

In Dodd-Frank, Congress addressed each of the hurdles facing whistleblowers through comprehensive legislation with provisions that work in tandem to better protect investors by incentivizing and protecting whistleblowers.

Congress recognized that Sarbanes-Oxley presented an unattractive risk-benefit ratio to financial services whistleblowers and sought to address this failure with Section 78u-6. Before Dodd-Frank, whistleblowers had no financial incentive to come forward to the Commission. Although some whistleblowers had contacted the government anyway, Congress was aware that many who knew of the conduct that precipitated the financial crisis had not. Section 78u-6 made reporting to the government more appealing by offering whistleblowers ten to thirty percent of any Commission recovery over one million dollars that resulted from their information. 15 U.S.C. § 78u-6(b)(1). To address whistleblowers' concern that the Commission would ignore their information, Congress mandated that the Commission create an Office of the Whistleblower to administer Section 78u-6. 15 U.S.C. § 78u-7(d).

In response to the financial service industry's blacklisting of whistleblowers, Congress enacted two confidentiality provisions to protect their identities. First, Section 78u-6 provides that whistleblowers may submit information to the Commission anonymously. 15 U.S.C. § 78u-6(d)(2)(A). Second, it prohibits the Commission from "disclos[ing] any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower" absent exceptional circumstances. *Id.* § 78u-6(h)(2)(A).[2]

Finally, Congress adopted a provision that protects whistleblowers in the circumstances in which they typically face retaliation. Section 78u-6 provides that:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission

---

[2] Although whistleblowers must reveal their identities to the Commission before payment of an award, this has no bearing on the Commission's obligation to keep confidential any information that might identify the whistleblower. 15 U.S.C. § 78u-6(d)(2)(B).

> based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

Id. § 78u-6(h)(1)(A). Subdivision (iii) references Sarbanes-Oxley, which addresses internal reporting, *see* 18 U.S.C. § 1514A(a)(1)(C), and Section 1513(e), which addresses assistance to the government not reached by Subdivision (ii), *see* 18 U.S.C. § 1513(e). The remaining references serve as a catchall to address other required and protected reports.

III. Both industry and the Commission understood the anti-retaliation provision to protect internal reporting regardless of whether an individual also reported to the Commission.

Upon Dodd-Frank's enactment, both industry actors and the Commission agreed that Section 78u-6's anti-retaliation provisions protected whistleblowers who reported internally regardless of whether they reported to the Commission. In a Commission rulemaking for the statute's implementing regulations, regulated entities and their legal representatives argued that the Commission should require internal reporting as a condition for receiving awards. They claimed that

mandatory internal reporting supported internal compliance programs without undermining whistleblower protections because whistleblowers were protected against retaliation under Section 78u-6:

- "[An internal reporting] requirement would not significantly disadvantage valid whistleblowers because of . . . safeguards against retaliation for internal reporting contained in the Sarbanes-Oxley Act and the whistleblower provisions [of Dodd-Frank]. . . ." Comment Letter from Davis Polk & Wardwell LLP to Secretary Murphy (Dec. 17, 2010), https://www.sec.gov/comments/s7-33-10/s73310-200.pdf.

- "We recognize the valid concern that some employees will fear retaliation for blowing the whistle. The solution to that problem is not, however, a scheme to undermine important and effective internal compliance and reporting systems; rather, employees who fear retaliation may rely on the anti-retaliation provision contemporaneously enacted by Congress." Comment Letter from Association of Corporate Counsel to Secretary Murphy (Dec. 15, 2010), https://www.sec.gov/comments/s7-33-10/s73310-126.pdf;

- "An internal reporting requirement is unlikely to have a negative effect on the proposed rules, as companies would be given a more immediate opportunity to cure or mitigate potential violations and

> the whistleblower would remain protected by the anti-retaliation provisions in the Dodd-Frank Act." Comment Letter from Thompson Hine LLP to Secretary Murphy (Dec. 3, 2010), https://www.sec.gov/comments/s7-33-10/s73310-26.pdf.

The Commission's final rule—Rule 21F-2—also reflects the view that the statute's anti-retaliation provisions protect internal reporting. *See* 17 C.F.R. § 240.21F-2(b).

Ironically, industry's main argument that the Commission should require internal reporting was that whistleblowers would otherwise bypass internal compliance and go straight to the Commission to obtain an award. *See, e.g.*, Comment Letter from U.S. Chamber of Commerce and U.S. Chamber Institute for Legal Reform to Secretary Murphy (Dec. 17, 2010), https://www.sec.gov/comments/s7-33-10/s73310-194.pdf ("Businesses have a strong self-interest in detecting and eliminating illegal conduct within their organizations. . . . For these reasons, large numbers of companies have implemented strong internal reporting systems to obtain information about potential wrongdoing. . . . And we have no objection to the establishment of a reasonable whistleblower program that allows individuals to bring actionable information to the attention of the SEC when the company itself is unwilling or unable to engage in effective self-policing."). Exactly this result, however, would follow from Petitioner's reading of the statute—that employees

must report to the Commission to benefit from the anti-retaliation protections of Dodd-Frank.

The Commission agreed that Congress did not intend Dodd-Frank to undermine internal reporting and subsequently promulgated several regulations to encourage, but not require, whistleblowers to report internally before coming to the Commission. *E.g.*, 17 C.F.R. § 240.21F-6(a)(4) (increasing award for whistleblowers who first report internally).

IV. The contemporaneous understanding of the anti-retaliation provision is consistent with the statute's text, structure, and the underlying congressional policy.

A. The term "whistleblower" can have different meanings within the statute even if the statute defines the term.

The Commission's regulation applies a context-appropriate definition of "whistleblower" for the anti-retaliation provision in Section 78u-6. This Court has endorsed such an approach when—as here—it best effectuates Congress's intent.

Context often forces identical words and phrases to take different meanings within the same statute, even when that statute defines them. Although the default presumption is that a given term has the same meaning throughout a single statute, *e.g.*, *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007), this presumption "readily yields" to context, as a single term may take on different meanings "in the same statute or even in the same section," *Atl. Cleaners & Dyers v.*

United States, 286 U.S. 427, 433 (1932). And when the meaning of a term derived from statutory context clashes with its statutory definition, the contextual meaning takes precedence. *E.g.*, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343-44 (1997).

For example, despite the statutory definition of "employee" in Title VII of the Civil Rights Act, that term takes on different meanings in the Act's substantive provisions when those provisions are inconsistent with the definition. *Robinson*, 519 U.S. at 342-43. Title VII defines "employee" as "'an individual employed by an employer,'" a definition that appears to cover only current employees. *Id.* at 342 (quoting 42 U.S.C. § 2000e(f)). The statute's substantive provisions, however, extend protections to "employees" who fall outside that definition. Title VII provides for the reinstatement and hiring of "employees," which are remedies applicable only to former and prospective employees, respectively. *Id.*; *see also id.* at 343 n.3 ("employee" plainly covers prospective employees elsewhere in Title VII). The Court interpreted "employee" to have meanings different from the statutory definition as context required. *Id.* at 343-44.

Likewise, the Clean Air Act broadly defines "air pollutant" as "'any physical, chemical, biological, [or] radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.'" *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2439 (2014) (quoting 42 U.S.C. § 7602(g)). But the statute would become impossible to administer if each provision that employed that term regulated every "air pollutant" as

the definition suggests. *Id.* at 2444. The Court held that the EPA's implementing regulations must adopt different, context-specific definitions for "air pollutant" to give effect to the whole statute. *Id.* at 2442; *see also id.* at 2452 (Breyer, J., concurring in part and dissenting in part).

1. **The term "whistleblower" must take a different meaning in the anti-retaliation provision than it does in the reward provision to give full effect to the statute's protections for whistleblowers.**

Although Section 78u-6 defines the term "whistleblower," applying that definition to the anti-retaliation provision precludes the statute's protective provisions from operating in tandem, producing results that Congress could not have intended. The term "whistleblower" must take context-specific meanings throughout Section 78u-6 to give full effect to the statute's substantive provisions.

Section 78u-6 defines "whistleblower" as "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. § 78u-6(a)(6). Petitioner mechanically applies this definition to the anti-retaliation provision, arguing that it prohibits employers from retaliating against an employee who has reported internally only if that employee has reported to the Commission. But the

other whistleblower protection provisions in Section 78u-6 reveal the need for context-appropriate definitions.

Petitioner's reading of the statute denies its confidentiality benefits to internal whistleblowers who also report to the Commission. The statute provides that whistleblowers may submit information and award claims to the Commission anonymously. 15 U.S.C. § 78u-6(d)(2)(A). It also prohibits the Commission from "disclos[ing] any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower" absent exceptional circumstances. *Id.* § 78u-6(h)(2)(A). Applying the statutory definition of "whistleblower" to the anti-retaliation provision is incompatible with these confidentiality provisions: whistleblowers entitled to both types of protections would be forced to choose between them.

Consider an individual who makes an internal report protected by Sarbanes-Oxley, later submits information anonymously to the Commission, and subsequently suffers retaliation for the internal report. Under Petitioner's reading, the statute protects her from retaliation: she is a "whistleblower" who reported to the Commission, and also reported internally. To plead her anti-retaliation claim, however, she would have to plead that she qualified as a "whistleblower" under the statutory definition: *i.e.*, that she submitted information to the Commission. This would force her to sacrifice one statutory protection—anonymity in reporting to the Commission—to secure another—

anti-retaliation remedies.[3] Moreover, under this reading the confidentiality protections are rendered incoherent: she would be required to reveal herself as a Commission whistleblower, while the Commission would still be required to keep that information confidential.

If a statute's provisions cannot operate in tandem when a term takes a single meaning, that single meaning yields to a multiplicity of meanings determined by context, even if the term is defined by the statute. *Utility Air*, 134 S. Ct. at 2444; *Robinson*, 519 U.S. at 343-44. Applying the statutory definition of "whistleblower" throughout Section 78u-6 creates precisely this problem: statutory provisions designed to complement each other instead conflict, with the activation of one rendering the other inoperative. Resolving this tension requires "whistleblower" to take distinct meanings, derived from context, as Rule 21F-2 does.

2. The statute's design also supports context-specific definitions.

Section 78u-6's two distinct policies—incentives and protection—work in tandem to encourage financial industry whistleblowers. 15 U.S.C. § 78u-6. Applying context-specific definitions to those provisions serves these distinct policies.

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[3] Anti-retaliation claims filed under subdivisions (i) and (ii) do not present this problem: a whistleblower filing such a claim has by definition been identified—at least by her employer—as having contacted the Commission.

When Congress wanted only those whistleblowers who reported to the Commission to benefit from a policy, it said so in the text of the provision effecting that policy. The statute's incentive provision mandates awards for "whistleblowers who voluntarily provided original information to the Commission that led" to a successful enforcement action. *Id.* § 78u-6(b)(1). Requiring a report to the Commission makes this provision administrable: to reward a whistleblower for useful, timely information, the Commission must be able to trace that information to a whistleblower.

By contrast, the substantive provision protecting whistleblowers who report internally contains no language requiring a report to the Commission, *id.* § 78u-6(h)(1)(A)(iii), nor would such a requirement have anything to do with the goals of Subdivision (iii). Reporting to the Commission does not serve any purpose related to protecting whistleblowers from retaliation. And reading Subdivision (iii) to require reports to the Commission—as Petitioner advocates—yields absurd consequences. On Petitioner's reading, Subdivision (iii) protects internal whistleblowers who have also reported to the Commission, but its text requires no connection whatsoever between the report to the Commission and the internal report. *Id.*[4] A whistleblower

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[4] Congress plainly knew how to require such a connection: the immediately preceding subdivision protects whistleblowers who assist Commission investigations only when those investigations are "based upon or related to" information the whistleblower provides to the Commission. 15 U.S.C. § 78u-6(h)(1)(A)(ii).

could thus report a suspected violation to the Commission one week, internally report a completely unrelated violation the week after, and be entitled to the anti-retaliation protections of Dodd-Frank for the internal report only because of the unrelated earlier report to the Commission. There is no reason that reporting an unrelated violation to the Commission should make the internal report protected by Dodd-Frank's anti-retaliation protections.[5]

While the statutory definition of "whistleblower" suggests that reporting to the Commission is a condition of applying Dodd-Frank's retaliation protections, applying this definition to the anti-retaliation provision furthers no aim apparent from the statute and produces absurd results. When context-specific definitions better advance a statute's regulatory design than statutory definitions, the context-specific definitions control. *Utility Air*, 134 S. Ct. at 2440.

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[5] Petitioner's fear that, if the statutory definition does not apply, Subdivision (iii) would protect whistleblowers whose internal reports have nothing to do with the securities laws, *see* Br. 38, is unfounded. First, Rule 21F-2 protects from retaliation only those internal whistleblowers whose information "relates to a possible securities law violation" or a violation of Sarbanes-Oxley. *See* 17 C.F.R. § 240.21F-2(b)(1)(i). Second, the context of a statute imposes reasonable restraints on potentially overbroad language. *See Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (given context in which term appears, "tangible object" cannot include fish).

B. Applying Dodd-Frank's anti-retaliation protections to persons who report internally furthers Congress's purpose in ensuring that information about potential fraud is reported.

The Commission's rule follows a well-worn path: "In law as in life . . . the same words, placed in different contexts, sometimes mean different things." *Yates*, 135 S. Ct. at 1082. Rule 21F-2 accordingly applies context-specific definitions to effectuate Congress's purpose for Section 78u-6: expanding whistleblower protections so that companies and the government can more quickly address problems affecting investors and the markets. "From a legal, administrative, and functional perspective—that is, from a perspective that assumes that Congress was not merely trying to arrange words on paper but was seeking to achieve a real-world *purpose*—[this] way of reading the statute is the more sensible one." *Utility Air*, 134 S. Ct. at 2453 (Breyer, J., concurring in part and dissenting in part).

With its context-specific definitions, the Commission's rule gives effect to each provision of Section 78u-6. Rule 21F-2 distinguishes between two types of whistleblowers: those who seek awards and those who seek anti-retaliation remedies. Following the text of the corresponding substantive provision, the rule permits only those individuals who submit information to the Commission to apply for an award. 15 U.S.C. § 78u-6(b)(1); 17 C.F.R. § 240.21F-2(a). Likewise, the rule extends anti-retaliation protections to any individual who has reported a possible violation of the securities

laws to the Commission or internally. 15 U.S.C. § 78u-6(h)(1)(A)(iii); 17 C.F.R. § 240.21F-2(b).

Rule 21F-2 completely resolves the tension between the substantive provisions of Section 78u-6. Consider again the case of an individual who reports internally, then reports anonymously to the Commission, and is then fired for her internal report. Under the Commission's regulation, she receives each benefit Congress enacted: she may file an anti-retaliation claim under Dodd-Frank without having to plead her contact with the Commission to establish eligibility as a "whistleblower." She thus remains anonymous to the public as a Commission whistleblower, and the Commission's obligation to keep confidential information that might identify her is not rendered incoherent.

Rule 21F-2 also recognizes that Congress enacted Dodd-Frank as a response to crises in the financial services industry that whistleblowers had sought to prevent. *See Atl. Cleaners*, 286 U.S. at 435 (historical context of statutes informs their interpretation). In the wake of these crises, Congress intended to prevent future violations of the securities laws by enhancing protections for all whistleblowers—the bulk of whom report internally—who warn of such violations. Exempting the majority of whistleblowers from these protections would undermine Congress's intent.

C. Petitioner's reading of the statute would frustrate Congress's purpose by rendering it less likely that whistleblowers will report misconduct.

Petitioner's reading of Section 78u-6 is flatly at odds with Congress's purpose in enacting Dodd-Frank. Congress was aware that nearly all whistleblowers report internally, and that extending protections to those whistleblowers would enhance compliance with securities laws and better protect investors. *See* pp. 7-9, *supra*. And whistleblowers continue to report internally: in the wake of Dodd-Frank, *ninety-seven percent* of whistleblowers first reported internally, and *eighty-nine percent* escalated first reports internally. Ethics Res. Ctr., *Inside the Mind of a Whistleblower: A Supplemental Report of the 2011 National Business Ethics Survey* 13 (2012). Yet under Petitioner's reading of the statute, Dodd-Frank's anti-retaliation provision does not cover internal whistleblowers—by far the largest group—unless they report to the Commission before their employer retaliates against them. This frustrates the goals of a statute designed to encourage and protect whistleblowers.

In addition, Petitioner's reading of the statute makes the confidentiality protections illusory for individuals seeking anti-retaliation remedies. Half of all award recipients eligible to report anonymously do so, and *all* whistleblowers enjoy the statute's confidentiality protections. Sec. & Exch. Comm'n, *2016 Annual Report to Congress on the Dodd-Frank Whistleblower*

Program 18 (2016).[6] On Petitioner's reading, whistleblowers fired for reporting internally could not pursue Dodd-Frank's anti-retaliation remedies without compromising these confidentiality provisions.

Moreover, Petitioner's reading would produce the very result that industry urged the Commission to avoid: undermining internal compliance regimes. The vast majority of whistleblowers who eventually contact the Commission first report internally. Sec. & Exch. Comm'n, *2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program* 18. Yet Petitioner's reading of the statute would encourage whistleblowers to bypass compliance and go straight to the Commission in order to receive the benefit of the anti-retaliation provision.

Finally, Petitioner's reading does not serve the statute's policies: incentivizing and protecting whistleblowers to better protect investors. Applying Dodd-Frank's protections to whistleblowers simply looking to flag and fix misconduct within their organizations gives them the same robust protections as those who report to the Commission, making retaliation less likely. Protecting internal whistleblowers also preserves scarce government resources, allowing the Commission to focus its attention on corporations that fail to adequately self-regulate. And corporations keep their chance to correct issues internally, benefitting

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[6] Only whistleblowers represented by counsel at the time of their submission may report to the Commission anonymously. 15 U.S.C. § 78u-6(d)(2)(A).

their shareholders by avoiding the unwanted expense and attention of a Commission investigation.

Achieving these benefits requires only the application of a long-followed, unexceptional principle: "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States v. Heirs of Boisdoré*, 49 U.S. (8 How.) 113, 122 (1850), *quoted in Star Athletica L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017). This statute's "object and policy" is protecting investors by encouraging all whistleblowers, and that should guide its interpretation.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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